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September 17, 2021

Court of Appeals **via E-Service**
Third District of Texas
P.O. Box 12547
Austin, Texas 78711-2547

Re: Cause No. 03-18-00153-CV; *Texas Department of Transportation v. Albert Lara, Jr.*

To The Honorable Court:

The Texas Department of Transportation (TxDOT) appealed the trial court's denial of its plea to the jurisdiction related to alleged (1) failure-to-accommodate; (2) traditional adverse-action disability discrimination; and (3) retaliation. The Texas Supreme Court affirmed this Court's decision that Lara raised a genuine issue of material fact with respect to the failure-to-accommodate claims and agreed that Lara cannot make a prima facie case of retaliation. The Texas Supreme Court remanded to this Court to address a claim of disability discrimination under the Texas Commission on Human Rights Act (TCHRA).

While TxDOT previously briefed this issue in this Court, TxDOT would welcome a request for additional briefing should the Court desire it.

Lara's recent letter to the Court implies that the only outstanding issue before this Court is whether or not a fact issue exists related to causation. That is not accurate. This Court has not determined whether or not a prima facie case of disability discrimination exists. Namely, that Lara suffered an adverse employment decision solely because of his disability. *Davis v. City of Grapevine*, 188 S.W. 3d 748, 757 (Tex. App.—Fort Worth 2006, pet. denied).

Assuming Lara met his prima facie burden, the burden shifts to TxDOT to articulate a legitimate non-discriminatory reason for the separation. Lara was out on leave beginning April 23, 2015 and never was released to return to work of any kind from that date through his separation on September 16, 2015. CR 52-53. Lara's leave balances were exhausted by May 5, 2015, and TxDOT worked with Lara to provide him the maximum amount of sick leave by law which expired September 16, 2015. CR 145, 75. Lara's family medical leave expired on July 15, 2015, Lara was the only contract inspector for the Milam County Office, and the five-month leave was placing a strain on the office. CR 98-112, 169-70. Further, despite being given procedures to formally request leave without pay if that is what Lara desired, Lara never requested leave without pay. *Id.* From April 2015 through the summer of 2015, Lara's doctors postponed Lara's potential return date numerous times, with the latest information being a potential return date of October 21, 2015 with a follow-up surgery shortly thereafter. CR 169-70. Thus, as the separation letter states, in order to meet business needs of the Bryan District it was necessary to separate Lara in order to hire a full-time employee to replace him at the expiration of the maximum sick leave pool leave. *Id.*

The inability to return to work upon the exhaustion of family medical leave or sick leave pool is a legitimate, nondiscriminatory reason for terminating an employee. *Karnes v. Cent. Tex. Mental Health Mental Retardation Ctr.*, CIV.A. 6:01-CV-045-C, 2002 WL 31257714, at *5 (N.D. Tex. Feb 22, 2002); *Hester v. Williamson Cty,, Tex.*, No. A-12-CV-190-LY, 2013 WL 4482918, at *6 (W.D. Tex. Aug. 21, 2013).

To raise a fact issue on the pretext element of discrimination Lara must present evidence "indicating that the non-discriminatory reason given by the employer is false or not credible, and that the real reason for the employment action was unlawful discrimination." *Elgaghil v. Tarrant Cty. Junior Coll.*, 45 S.W.3d 133, 140 (Tex. App.—Fort Worth 200, pet. denied). To establish pretext, "[t]he plaintiff must put forward evidence rebutting *each* of the nondiscriminatory reasons the employer articulates." *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 220 (5th Cir. 2001) (emphasis added). Lara's subjective belief that he has been a victim of discrimination or retaliation is not sufficient to defeat summary judgment. *M.D. Anderson Hosp. & Tumor Institute v. Willrich*, 28 S.W.3d 22, 25 (Tex. 2000); *Gumpert v. ABF Freight System, Inc.* 293 S.W.3d 256, 263 (Tex. App.—Dallas 2009, pet. denied). "[A] reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

Lara has provided no evidence that TxDOT's reasons in the September 9, 2019, letter were false or a pretext for discrimination. It is true that Lara's family medical leave expired July 15, 2015; it is true that Lara's doctors indicated that Lara could not return to work of any kind until *possibly* October 21, 2015; and it is true that TxDOT needed to hire a full-time employee to meet the business needs to alleviate the hardship of Lara's five-month absence. CR 114.

There is no evidence in the record that anyone in the Bryan District (1) was ever granted a longer leave than Lara; (2) was granted more leave than the 720 hours maximum sick leave provided to Lara; or (3) was granted leave without pay without requesting it. There is simply no evidence that discrimination was the real reason for Lara's separation.

Clearly, TxDOT believed that the extended five-month leave was a hardship and TxDOT did not think that an additional five-weeks of leave without pay was a reasonable accommodation. Thus, TxDOT was not violating its own policy when it separated Lara on September 16, 2021. And while that may be a fact issue for a jury to decide in a failure-to-accommodate claim—where a *McDonnell Douglas* burden shifting framework is not applicable[1]—Lara has not met its burden to show TxDOT's reasons for separation were pretext for discrimination in a traditional disability discrimination case.

TxDOT asks this Court to dismiss the traditional disability claim and remand for trial only the failure to accommodate claim. Should the Court desire additional briefing, TxDOT would be happy to provide it.

Respectfully,

/s/ *Amy K. Owens*

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[1] *Davis v. City of Grapevine*, 188 S.W. 3d at 759.

CERTIFICATE OF SERVICE

I certify that a copy of this Letter was served by delivering it to the following by electronic service:

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